

ORDER

The Notices and Orders of Civil Penalties are both AFFIRMED, but the first penalty of \$75 is SUSPENDED, and the second penalty of \$250 is REDUCED to \$100, which is due, and the \$150 to remain suspended, provided appellant does not violate the State Clean Air Act, Chapter 70.94 RCW or OAPCA Regulations for two years from the date of this Order.

DONE this 26th day of April, 1991.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Presiding


ANNETTE S. MCGEE, Member

0145B

VIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

1 renovation, state in pertinent part for notification requirements:

2 Each owner or operator to which this section
3 applies shall:

4 (a) Provide the Administrator with written notice
5 of intention to demolish or renovate.

6 (b) Postmark or deliver the notice as follows:

7 (1) At least 10 days before demolition begins if
8 the operation is described in §61.145(a);

9 (2) At least 20 days before demolition begins if
10 the operation is described in §61.145(b);

11 (3) As early as possible before demolition begins
12 if the operation is described in §61.145(c);

13 (4) As early as possible before renovation
14 begins.

15 We conclude that appellant Damian did not notify OAPCA with
16 written intention to renovate the facility, and therefore violated
17 this provision.

18 VI

19 Under CFR 61.147, procedures require that asbestos materials be
20 adequately wetted whenever removed, or stripped, to prevent emissions
21 of asbestos to the outside air. We conclude these steps were not
22 followed and a violation occurred.

23 VII

24 Penalties are not levied to punish, but to encourage
25 compliance. When informed by OAPCA and L & I of the procedures,
26 regulations, and potential hazards, Mr. Damian cooperated. We
27 conclude that appellant Damian has a new understanding of asbestos and
its hazards.

1 liability where lack of knowledge is not a defense.

2 III

3 The federal regulations cited by OAPCA are at 40 CFR Part 61.146
4 and 147(a)(2); all refer to requirements imposed on an "owner or
5 operator" of a demolition or renovation operation. The definition of
6 40 CFR 61.02 states:

7 "Owner or operator" means any person who owns,
8 leases, operates, controls, or supervises a
9 stationary source.

10 From the Environmental Protection Agency's commentary on these
11 regulations, when promulgated, 49 Federal Register 13659 (April 5,
12 1984), it is clear that the term "owner or operator" applies both to
13 the contractor doing demolition or renovation work in a building and
14 to the owner or operator of the building itself. EPA construes the
15 air pollution "source", however, to be the demolition or renovation
16 operation. The building owner or operator becomes an "owner or
17 operator" of such a source by purchasing the services of the
18 contractor, thereby acquiring ownership and control of the operation.

19 IV

20 We conclude that Damian was an "owner or operator." He was in
21 charge of the project to clean up the former restaurant, and did the
22 work that took place. See, Herzog v. PSAPCA, PCHB No. 88-68.

23 V

24 The Federal regulations under CFR 61.146, dealing with
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XIX

Issuing of the fines was based on the reports of inspectors and the pictures taken at the site.

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Mr. Damian never completed the work at the building and never completed the lease of the facility. He is presently unemployed.

XXI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

It is unclear the Pollution Control Hearings Board has jurisdiction over the parties and the subject of this appeal, as to whether the appeal was timely filed. Chapter 70.94 RCW, Chapter 43.21B. Since we don't know when appellant received the Notices of Civil Penalty Assessment, we cannot now conclude we do not have jurisdiction. (See Findings of Fact XVI and XVII, above.)

II

The civil penalties at issue are based on violations applicable under WAC 173-400-075, a state regulation which incorporates provisions of the federal regulations in 40 CFR Part 61, relating to asbestos removal. OAPCA has the authority to enforce such regulations. RCW 70.94.331(6). These laws are ones of strict

1 Both notices were issued to Zaky Damian, 210 E. 4th Avenue,
2 Olympia, Washington, 98501. They were dated April 26, 1990, with
3 Inspector Gregory Connor having visited the site about 2:50 p.m. They
4 were sent by certified mail April 27, 1990 and received April 28, 1990.

5 XVI

6 Subsequently, OAPCA issued a Notice of Civil Penalty Assessment
7 #1293-87, dated September 17, 1990 for \$75 for the first alleged
8 violation, and Notice of Civil Penalty Assessment #1294-87, dated
9 September 21, 1990 for \$250 for the second alleged violation.

10 XVII

11 On December 10, 1990, the Pollution Control Hearings Board
12 received a Request for Hearing on the penalty assessments, which
13 became appeal PCHB No. 90-231.

14 XVIII

15 After review of the testimony, and documents admitted, we find
16 that Mr. Damian did not realize he was scraping off asbestos, nor that
17 it was in fact dangerous to do so, nor what steps should be taken,
18 actions giving rise to the violations charged.

19 Despite inspections by the City of Olympia, Mr. Damian was
20 unaware of asbestos, asbestos debris, or proper handling methods.
21 When contacted by OAPCA and Labor & Industries personnel, Mr. Damian
22 took action to keep people out of the building, and the agency people
23 did not feel resistance from Mr. Damian, nor did they sense a lack of
24 cooperativeness or a feeling it was an intentional violation.

1 possibility that the building might have asbestos, and thus would need
2 special certified asbestos removers to be hired.

3 XIII

4 When Mr. Damian was told of the asbestos regulations and
5 potential hazards, he immediately cooperated, taking steps to close
6 the building from further work. He discontinued the paint scraping
7 and painting project, and took action to remove his volunteer helper
8 from the building. The lease was never finalized.

9 XIV

10 OAPCA is a municipal corporation with authority to carry out a
11 program of air pollution prevention and control in an area which
12 includes Olympia. OAPCA's Regulation I and Federal Register's
13 CFR 61.116, 147 have been filed with the Board and the Board takes
14 official notice of those regulations, with OAPCA having been
15 designated as an agency to enforce the Federal regulations.

16 XV

17 Two notices of violation were issued by OAPCA in connection with
18 the April 25, 1990 inspection. The violations alleged were: 1)
19 failure to notify OAPCA of intent to remove or encapsulate asbestos,
20 as the first violation; 2) improper removal practices causing visible
21 emissions of asbestos, as the second violation.

1 for the method of handling the asbestos. He indicated there were
2 health hazards with asbestos. Both violations were delivered April
3 26, 1990, at 2:50 p.m. Because notice of intent to remove
4 encapsulated asbestos is to be given at least 10 days before the
5 removal, both penalty violations were considered as first violations
6 in issuing the penalties.

7 IX

8 Mr. Damian, who was the potential leasee of the building, was
9 unable to proceed with the renovation, did not lease the building, and
10 is unemployed. He is not a contractor or remodeler, but had been
11 trying to clean the building and paint it prior to opening a
12 restaurant. It had been closed for a time prior to his intended lease.

13 X

14 Mr. Damian had asked the city to do the inspections to assure he
15 was complying with the ordinances and to be sure the building would be
16 safe for the health of customers.

17 XI

18 Neither of the documents for the city inspections prior to
19 removal made any reference to asbestos. Mr. Damian was told orally
20 the building was safe.

21 XII

22 Neither the owner of the building, none of the neighbors, the
23 real estate agent, nor inspectors of the building mentioned the
24

1 to Mr. Damian about the laws involving asbestos, about notification of
2 the agency and took pictures of some of the material scraped from the
3 walls which were swept into piles outside. Inspector Connor took some
4 samples of the material for laboratory inspection. Dan Locke, an
5 industrial hygienist with Washington State Labor & Industries, went to
6 the building and took three samples of material from inside and one
7 outside the building. He returned a day later and took another sample
8 of material from outside the building.

9 VI

10 Wally Suydam, a chemist who works for State Labor & Industries,
11 received the samples from Mr. Locke and tested the materials,
12 indicating the samples contained low to moderate concentrations of
13 chrysotile asbestos.

14 VII

15 Dan Locke met with Mr. Damian on April 26, 1990, and helped "red
16 tag" the building to prevent further work there. He said Mr. Damian
17 made no resistance to the idea of having a certified asbestos remover
18 finish the task of removing material from the building. Sample lab
19 results were faxed to Inspector Connor of OAPCA.

20 VIII

21 OAPCA Control Officer Charles Peace decided on the civil
22 penalties of \$75 for the first alleged violation, citing lack of
23 notification of the work to OAPCA, and \$250 as the second violation,
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1 "change of use" inspection application and approval to remodel the
2 building at 926 Fourth Avenue East, Olympia, into a restaurant.

3 II

4 Mr. Damian, who formerly operated Peppe's Pizza on East 4th
5 Avenue, planned to change the building, formerly Arctic Circle
6 Drive-In, and an office supply store, to a small restaurant. The City
7 of Olympia's building inspector, electrical, plumbing, and fire
8 department all inspected the building. None of the city personnel
9 mentioned asbestos, the possibility of its presence, nor its potential
10 health hazards.

11 III

12 On April 25, 1990, the Olympic Air Pollution Control Authority
13 received an anonymous telephone call about possible violation of air
14 pollution regulations at the building where Damian and a volunteer
15 helper were planning to paint the interior, but first were scraping
16 off the textured surface of the ceiling.

17 IV

18 The State Labor & Industries office also received an anonymous
19 telephone call April 25, 1990, suggesting that there may be a
20 violation of health regulations at the same site where Mr. Damian was
21 working.

22 V

23 Inspector Gregory Connor of OAPCA went to the site and explained
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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ZAKY DAMIAN,)
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Appellant,) PCHB No. 90-231
)
v.)
)
OLYMPIC AIR POLLUTION CONTROL) FINAL FINDINGS OF FACT,
AUTHORITY,) CONCLUSIONS OF LAW
) AND ORDER
Respondent.)
_____)

This matter came on for hearing Tuesday, April 9, 1991, in Lacey, Washington, before the Pollution Control Hearings Board; Harold S. Zimmerman, presiding. Member Annette S. McGee reviewed the record.

Appellant Zaky Damian was represented by Lisa Ellen Seifert, attorney at law. Respondent Olympic Air Pollution Control Authority (OAPCA) was represented by Fred D. Gentry, attorney at law. The proceedings were recorded by Lisa Alger, of Gene Barker and Associates.

Witnesses were sworn and testified. Exhibits A-1, A-2, R-1, R-2, R-3, and R-4 were admitted and examined. From the testimony heard and exhibits examined, the Pollution Control Hearings Board makes the following:

FINDINGS OF FACT

I

Zaky Damian of 7201 Henderson Boulevard SE, #9-A, Olympia, Washington, on April 16, 1990, obtained from the City of Olympia a